IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO. 191 OF 2004.

Shri Pramod Meshram,
Sole Proprietor of Invitation Travel,
50, Parekh Mahal,
1st Floor, 217, L.J. Road,
Dadar (West) Bombay 400 016. ..... Petitioner

Versus

1. Shri Vinay Parulekar,
   Padhye Building,
   1st Floor, Opp.Maruti Mandir,
   Dadar, Bombay 400 028.

2. S T A T E,
   Through the Public Prosecutor. .... Respondents.

Mr. S. G. Bhobe, Advocate for the Petitioner.

CORAM: N. A. BRITTO,

DATE: 2nd SEPTEMBER, 2004.

ORAL ORDER:

Heard Shri S.G. Bhobe, the learned counsel of the petitioner.

The petitioner is accused in C.C. No.130/A/97/C who is being prosecuted by the complainant in that case under Section 138 of the Negotiable Instruments Act, 1881.

2. It appears that the complainant's evidence was closed somewhere in January, 1999, as submitted by Shri Bhobe, the learned counsel and thereafter the evidence of the complainant's witnesses was taken in July, 1999 and October, 1999 respectively. The complaint's evidence was apparently closed after the complainant refused to give certain answers to the questions asked to him in cross-examination, as desired. The case of the accused, I am informed, was fixed for recording S.313 statement of the accused in April, 2004, when the accused filed an application not to examine the accused under S.313 of the Code of Criminal Procedure (Code, for short) in relation to the evidence of the complainant which was closed by the learned J.M.F.C. since by the said closure the accused was deprived of an opportunity to cross-examine the complainant properly.

3. The said application of the petitioner/accused came to be rejected by the Order of the learned J.M.F.C. dated 5.7.2004. The petitioner has now invoked the jurisdiction of this Court under Section 482 of the Code.

4. It is the submission of Shri Bhobe, the learned counsel that since the evidence of the said complainant was closed by the learned J.M.F.C. on the failure of the complainant to answer certain questions on being asked repeatedly, the said evidence is no evidence in the eyes of law and therefore could not be put to the accused under S.313 of the Code.

5. In support of the said submission, Shri Bhobe has placed reliance on the case of **Ram Kumar v. Emperor (A.I.R. 1937 Oudh 168) which,** according to the learned counsel, is the closest case on the point of law involved in this case.

6. In the case of **Ram Kumar (supra) the evidence of the prosecutrix** was closed after certain observations were made regarding her demeanour and conduct. The High Court of Oudh therefore held that the evidence of the said prosecutrix was no legal evidence unless it was subjected to cross-examination since no opportunity was given to the counsel to test the veracity of the said witness. In my view when the High Court of Oudh observed that the evidence of the said prosecutrix was no legal testimony, what it meant was that it was no legal testimony for the purpose of convicting the accused.

7. That is not the case at hand. Inspite of the closure of the evidence of the complainant there would be still some incriminating circumstances which would be required to be put to the accused. What weight is to be given to the said incriminating circumstances in the background of the closure of the evidence of the complainant is a matter which the learned Trial Court would be required to decide, not at the stage of recording S.313 statement of the accused, but at the stage of pronouncing the final judgment.

8. Section 313 of the Code requires the Court in every inquiry or trial for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him. In fact, the accused has no say in that matter, as it is the duty of the Court. This duty of the Court has been elaborately dealt with by a Division Bench of the Karnataka High Court in the case of **State of Karnataka v. Dashrath and 2 Ors.** (1991 (3) Crimes 22) wherein the Division Bench observed that:-

> " Section 313 of the Code provides an opportunity to the accused "personally to explain any circumstances appearing in the evidence against him". The answers given by the accused may be taken into consideration in such trial. With a view to provide a fair opportunity to the accused, the law casts the obligation on the Court itself to frame the relevant questions so that the accused may have an opportunity to explain all circumstances appearing against him. To ensure fairness, the questioning is to be done by the Court without the aid of the Counsel and this at once emphasises the seriousness of the duty cast upon the Court. The Court must question the accused in relation to all incriminating circumstances appearing against the accused. Even if the accused was present when the witnesses deposed against him the law still casts upon the Court a duty to marshal the evidence and to cull-out all the incriminating circumstances and question the accused in respect thereof so that

the accused may offer his explanation. “

9. Notwithstanding that the evidence of the complainant was prematurely closed in this case, the Court was bound to question the accused in respect of the other incriminating circumstances appearing against him. The accused is free to provide whatever answers he chooses to give to the said questions. In my opinion, the impugned Order could not be faulted. The jurisdiction of this Court under Section 482 of the Code though wide has got to be exercised sparingly. The case at hand is not a case to exercise such jurisdiction.

10. The petition of the accused is therefore hereby rejected in limine.

N. A. BRITTO, J.

sl.